

1997

Form Contracts under Revised Article 2 (Symposium: Consumer Protection and the Uniform Commercial Code)

James J. White

University of Michigan Law School, jjwhite@umich.edu

Available at: <https://repository.law.umich.edu/articles/404>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Commercial Law Commons](#), [Contracts Commons](#), [Courts Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

White, James J. "Form Contracts under Revised Article 2 (Symposium: Consumer Protection and the Uniform Commercial Code)." *Wash. U. L. Q.* 75, no. 1 (1997): 315-56.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

FORM CONTRACTS UNDER REVISED ARTICLE 2

JAMES J. WHITE*

I. INTRODUCTION

The current draft of section 2-206 in Revised Article 2 of the Uniform Commercial Code ("UCC") entitled "Consumer Contract: Standard Form"¹ presents a unique and threatening challenge to the drafters of consumer form contracts. In earlier drafts, one part of the section applied to both to commercial contracts and consumer contracts. It required that "one manifest assent" to any form contract, commercial or consumer, in order for it to be binding.² Bowing to commercial opposition in the most recent version, the drafters have omitted all reference to commercial contracts. As the section stands, it applies only to consumer contracts.

Section 2-206(a) provides that a consumer is not bound by a term in a contract if:

In a consumer contract, if a consumer agrees to a record by authentication or affirmative conduct, any non negotiated term that a reasonable consumer in a transaction of this type would not expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before the contract was authenticated.³

* Robert A. Sullivan Professor of Law, The University of Michigan Law School. Professor White wishes to thank Steve Young, University of Michigan Law School, Class of 1997, and Jennifer Gallagher, University of Michigan Law School, Class of 1996, for their assistance with this Article. Professor White served on the Article 2 Study Committee and is currently a member of the ALI Ad Hoc Committee for the revision of Article 2.

1. This new version was approved by the Drafting Committee in its March 21-23, 1997 meeting.

2. Draft, Uniform Commercial Code Article 2—Sales § 2-206(a) (Nat'l Conference of Comm'rs on Unif. State Laws, Aug. 1, 1996) [hereinafter Aug. 1996 Draft, Art. 2]. The section reads:

If all of the terms of a contract are contained in a record which is a standard form or contains standard terms and the party who did not prepare the record manifests assent to it by a signature or other conduct, that party adopts all terms contained in record as part of the contract except those terms are unconscionable.

Id.

3. The quoted version won approval by the Drafting Committee in its March 21-23, 1997 meeting. This section is new to the UCC and is the result of discussions about the December 1994 draft. Draft, Uniform Commercial Code Article 2, Sales § 2-206 note (Nat'l Conference of Comm'rs on Unif. State Laws, Feb. 10, 1995) [hereinafter Feb. 1995 Draft, Art. 2]. In the February 10, 1995 draft of Article 2 of the UCC, section 2-206 appeared with three alternatives:

(a) If the agreement of the parties is represented by a standard form and prior to or within a reasonable time after the agreement, the party who did not prepare the standard form manifests

assent to it by conduct or by signing the standard form after having had an opportunity to review the form, the party manifesting assent to the standard form

Alternative A

adopts all of the terms of the standard form except terms that are unconscionable.

Alternative B

adopts all of the terms of the standard form except terms that the party who prepared the form knew would cause the other party to refuse the contract if the term were brought to the attention of that party and the term was not brought to that party's attention.

Alternative C

adopts all of the terms of the standard form except that, if the other party has reason to believe that the party who manifests assent would not do so if that party knew that the writing contained a particular term, that term is not part of the agreement.

....

(b) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form and without regard to whether the party actually read the form.

Id. § 2-206. This section depended on the definitions of "manifests assent," "standard form," and "opportunity to review," found in section 2-102 of the February 10, 1995 draft:

(34) A party "manifests assent" to a record if, after having an opportunity to review the terms of the record, the party engages in conduct that the record provides will constitute acceptance of the terms of the record and the party had an opportunity decline [sic] to engage in the conduct after having an opportunity to review the terms.

....

(36) A party has an "opportunity to review" the terms of a record if the record is made available to the party before the party's acquisition of goods or of a copy of intangibles or, in a transfer of rights in which no copy is delivered, before the transfer of rights, in a manner designed to call the terms to the attention of the party assenting to the form, or is provided in such a manner that the terms will be conspicuous in the normal course of initial use or preparation to use the goods or intangibles. In a mass market license, a party has an opportunity to review if the party assenting to the form is authorized to obtain a refund of all license fees paid by returning the copy of the intangibles or discontinuing use following its opportunity to review the terms of the license.

....

(45) "Standard form" means a contract prepared by one party in advance for general and repeated use, contained in a record substantially consisting of standard terms and actually used without negotiation of the standard terms with the other party.

(46) "Standard terms" means terms prepared in advance for general and repeated use by one party.

Id. § 2-102.

At the January 1995 meeting, Alternative A received support. Alternative B had been based on section 2-2203 of Chapter 3—Licenses (now Article 2B), which itself incorporated the *Restatement (Second)* section 211 approach. Alternative C was based directly on section 211(c) of the *Restatement (Second)*. Feb. 1995 Draft, Art. 2, *supra*, § 2-206 note. Both alternatives B and C would have excluded some terms in form contracts when the drafting party should have called the nondrafting party's attention to the terms, but did not.

For the October 1, 1995 draft of section 2-206, a new subsection (b) was added, reading:

(b) No term in a standard form to which a consumer has manifested assent by conduct or by signing the standard form or otherwise is part of the agreement if the consumer could not reasonably have expected it, unless it has been expressly agreed to by the consumer. In determining whether a term

is of such a character regard shall be had to the content, language and presentation.

Draft, Uniform Commercial Code Article 2, Sales § 2-206 (Nat'l Conference of Comm'rs on Unif. State Laws, Oct. 1, 1995) [hereinafter Oct. 1995 Draft, Art. 2], *available at* <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 5, 1997). This new subsection (b), providing a "special rule for consumers," was based on article 2.20 of the UNIDROIT Principles. *Id.* § 2-206 note 5. At the October 1995 meeting, Alternative A was formally adopted.

The August 1, 1996 version of section 2-206 of the Uniform Commercial Code read:

(a) If all of the terms of a contract are contained in a record which is a standard form or contains standard terms and the party who did not prepare the record manifests assent to it by a signature or other conduct, that party adopts all terms contained in record [sic] as part of the contract except those terms that are unconscionable.

(b) A term in a record which is a standard form or which contains standard terms to which a consumer has manifested assent by a signature or other conduct is not part of the contract if the consumer could not reasonably have expected it unless the consumer expressly agrees to the term. In determining whether a term is part of the contract, the court shall consider the content, language and presentation of the standard form or standard term.

(c) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form record, whether or not the party read the form.

Aug. 1996 Draft, Art. 2, *supra* note 2, § 2-206. The relevant definitions in the August 1, 1996 draft of section 2-102 read:

(28) A party "manifests assent" to a record if, after having an opportunity to review the terms in the record, the party engages in conduct that under the circumstances constitutes acceptances of the terms of the record and the party had an opportunity to decline to engage in the conduct.

....

(30) A party has an "opportunity to review" a record if the record is made available in a manner designed to call the terms to the attention of the [sic] party before assent to the record or is provided in such a manner that the terms will be conspicuous in the normal course of initial use or preparation to use the goods.

....

(37) "Standard form" means a record prepared by one party in advance for general and repeated use that substantially contains standard terms and was used in the transaction without negotiation of, or changes in, the substantial majority of standard terms. Negotiation of price, quantity, time of delivery or method of payment does not preclude a record from being a standard form.

(38) "Standard terms" means terms prepared in advance for general and repeated use by one party and used without negotiation with the other party.

Id. § 2-102. On August 19, 1996 the ABA/UCC Subcommittee on Sales of Goods issued a memorandum to the NCCUSL-ALI Article 2 Drafting Committee. Memorandum from ABA/UCC Subcomm. on Sales of Goods (formerly the Task Force on Article 2 Revision) to NCCUSL-ALI Article 2 Drafting Committee (Aug. 19, 1996). In this memorandum, the Subcommittee pointed out that the scope of section 2-206 had expanded, "albeit perhaps unintentionally," to cover virtually all contracts. *Id.* encl. at 3-4. This was a considerably broader scope than the original "focus on standard form contracts presented by one party on a 'take it or leave it' basis." The Subcommittee has taken the position that "[a]ll fully negotiated 'white-paper' (as opposed to standard form) contracts, some the size of telephone books" would be covered by section 2-206, because they include standard terms included by one party which are included, unaltered, in the final contract.

The ABA/UCC Subcommittee suggested that the definitions of "standard terms," "standard forms," "manifests assent," and "opportunity to review" be eliminated and that section 2-206 be

redrafted. *Id.* encl. at 3.

For the November 1, 1996 draft, section 2-206 had been changed to read:

(a) Subject to subsection (b) and Section 2-207(a), if all or part of an agreement is contained in a standard form record and the party who did not prepare the record manifests assent to it, that party adopts all of the terms contained in the form as part of the contract except those terms that are unconscionable.

(b) Where a consumer has manifested assent to a standard form record, a term contained in the record that the consumer could not have reasonably expected is not part of the contract unless the consumer expressly agrees to it.

(c) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form record, whether or not the party read the form.

(d) A term of a standard form which is unenforceable under other provisions of this article, such as a provision that requires conspicuous language or express agreement to a term, does not become part of the contract unless those other provisions are satisfied.

Draft, Uniform Commercial Code Revised Article 2, Sales § 2-206 (Comm. on Style, Nat'l Conference of Comm'rs on Unif. State Laws, Nov. 1, 1996) [hereinafter Nov. 1996 Draft, Art. 2], *available at* <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 23, 1997). The Drafting Committee had not followed the ABA/UCC Subcommittee's advice to eliminate the definitions, although Dmanifests assentC and opportunity to review" had been moved into section 2-103, which still acted to require conspicuousness in all contracts, commercial or consumer, to which section 2-206 applied.

For the January 24, 1997 draft, the Drafting Committee narrowed the scope of section 2-206 to apply only to standard form contracts involving consumers. They also created a list of factors to be considered by a court hearing a dispute arising under this section. The revised section read:

(a) Subject to Section 2-207, where a consumer authenticates a standard form or engages in other affirmative conduct that appears to agree to the terms of a standard form, . . . terms that a reasonable consumer in a transaction of this type would not expect to appear in the form are not part of the agreement.

(b) When a consumer claims that a . . . term is excluded under subsection (a), the court shall afford the parties a reasonable and expeditious opportunity to present evidence on whether the term was reasonably expected. Evidence may include but is not limited to:

(1) Efforts by the party preparing the form to inform the consumer of the terms, including:

(A) The setting and circumstances in which the form was or in the ordinary course of business is presented to the consumer;

(B) Whether the term was called to the consumer's attention in fact or in the ordinary course of business or through a prior course of dealing between the parties;

(C) The degree to which the seller, or any other person on the seller's behalf, publicized the terms of the type of sale involved, including the term in dispute;

(D) The degree to which the consumer knew of and understood the terms prior to authentication or other affirmative conduct; and

(2) Facts from other sources that are relevant to the consumer's reasonable expectations, including:

(A) The nature and price of the described goods;

(B) The expectations of other consumers in similar types of transactions;

(C) Usages, standards and common practices with respect to goods of the same type of description;

In addition, the current version of section 2A-206 on leases contains a similar, but somewhat different form.⁴

Assume that a consumer who signs a form contract (a “nonnegotiated term”) for the purchase of goods covered by Revised 2-206(a). Assume that the signer, the consumer, does not read the contract, as few of us do, and assume that the consumer later wishes to challenge a disclaimer of warranty, a prohibition of consequential damages, a contractual statute of limitations limiting his or her claim to two years, or any of a variety of other terms that might be included in this form contract.

Assume further that the consumer is willing to testify that he did not “expect” the particular term and did not have “knowledge” of it.⁵ If one believes this subjective assertion, the consumer is not bound by the contract, at least if the consumer’s expectation was “reasonable.” Revised 2-206 overturns the ancient rule that one who signs a contract is bound by it whether he read it or not.⁶ The new provision is copied from article 2.20 of the

(D) Previous purchases made from other sellers of goods of the same type or description;

(E) Characteristics particular to the consumer involved, such as lack [of] education or more than average knowledge about the type of transaction involved.

(c) Issues arising under subsection (b) shall be decided by the court as a matter of law. If the seller establishes that a reasonable consumer had reason to know of the contested term and authenticated or engaged in other affirmative conduct of agreement, a prima facie case is established that the term is part of the agreement.

(d) If the seller complies with other requirements in this Article for including terms in a consumer contract, nothing in this section shall exclude such terms.

Draft, Uniform Commercial Code Revised Article 2 Sales § 2-206 (Nat’l Conference of Comm’rs on Unif. State Laws, Jan. 24, 1997), *available at* <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 21, 1997).

In the version approved at the March 21-23, 1997 meeting, subsection (b), dealing with consumer contracts, became subsection (a), in the form quoted above.

4. The January 1997 version of section 2A-206(a) read:

Where a consumer authenticates a standard form or engages in other affirmative conduct that appears to agree to the terms of a standard form, . . . terms that a reasonable consumer in a transaction of this type would not expect to appear in the form are not part of the agreement.

Draft, Uniform Commercial Code Article 2A, Leases § 2A-206(a) (Nat’l Conference of Comm’rs on Unif. State Laws, Jan. 1997), *available at* <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 22, 1997). When and if the Article 2 Drafting Committee settles on a version of section 2-206(a), the Article 2A Drafting Committee will probably conform section 2A-206 to the final Article 2 version.

5. Express agreement would presumably occur by initialing.

6. See *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So. 2d 1254, 1257 (Miss. 1991); *Comer v. World Ins. Co.*, 318 P.2d 916, 926-28 (Or. 1957) (en banc).

UNIDROIT Principles that reads in full as follows:

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard is to be had to its content, language and presentation.⁷

By choosing the UNIDROIT Principles as a template,⁸ the drafters of Revised 2-206(a) have explicitly rejected the analogous provision in section 211(3) of the *Restatement (Second) of Contracts*. That provision reads in full as follows:

Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.⁹

In theory at least, the UNIDROIT Principles are more generous to the signer who wishes to escape a form contract. Under section 211(3) of the *Restatement* the signer escapes from a form contract only if (1) the *drafter* of the document (2) had reason to believe (3) that the one manifesting assent would not have agreed to the terms if he had known that the particular term was in the writing.¹⁰ The “would not do so” language was put into the *Restatement* over the objection of Professor Farnsworth,¹¹ who ultimately

7. UNIDROIT Principles of International Commercial Contracts, art. 2.20 (1994), available at <http://itl.irv.uit.no/trade_law/documents...xt/unidroit.principles.complete.html#NR34> (visited on Jan. 20, 1997).

8. Nov. 1996 Draft, Art. 2, *supra* note 3, § 2-206 note 4.

For background, Section 2-206 modifies the December, 1994 Draft based on the discussions of the Drafting Committee. Alternative A received substantial support at the January, 1995 meeting and was ultimately adopted by the Drafting Committee. Alternative B was derived from Section 2-2203 (“hub and spoke” draft, July, 1995) and Alternative C followed Section 211(c) [211(3)] of the *Restatement*, Second, except that the party is not required to expect the regular use of such forms. Subsection (b), which provides a special rule for consumers, is based upon UNIDROIT Art. 2.20.

After the September, 1996 meeting, subsection (a) was revised to include standard forms that contained *all or part* of the agreement rather than “all” of the agreement. In short, subsection (a) applies even if there are earlier or collateral agreements or proposals not contained in the record. In most cases, manifesting assent by signature will create the contract and, if the standard form record is integrated, exclude certain prior or collateral agreements under Section 2-202.

Id.

9. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

10. *Id.*

11. At the 1970 annual meeting of the American Law Institute (“ALI”), Professor E. Allen

became the reporter of the *Restatement*, and in spite of the concern of the original Reporter, Judge Braucher.¹² A lawyer suggested the revised language, arguing that a person who had signed or otherwise accepted a form contract should be forced to take the “good with the bad.”¹³ That is to say, he

Farnsworth said:

I’m troubled by the apparently simple form that contains a clause in the back of it, perhaps a more or less innocuous clause, but one which, it turns out, because of later events is important to the party signing.

It is quite possible, it seems to me, that under Mr. Willard’s language it would not be clear that he would not have signed the agreement had he known that this clause was added; and yet under your original language it would not be a part of the contract.

47 A.L.I. PROC. 527-28 (1970). Professor Farnsworth was instrumental in the later drafting of the UNIDROIT Principles. Article 2.20 of the UNIDROIT Principles contains language similar to the “original” language that Professor Farnsworth sought in section 211(3) of the *Restatement (Second) of Contracts*. Compare UNIDROIT Principles, art. 2.20 (1994), with RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

12. At the 1970 ALI meeting, Professor Braucher said:

Now, subsection (3) [of section 211] we had a lot of trouble with. It seemed to me that there was some kind of limiting principle, and there are cases where a limitation is imposed as to the term which really doesn’t belong in the standard form. We all know that if you have a page of print, whether it’s large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion’s mouth and hope it will be a friendly lion. . . .

....

Anyway, this clause doesn’t go as far as you might like to go, but it seems to me some limitation is required.

47 A.L.I. PROC. 525-26 (1970).

Answering a concern expressed by the Honorable Edward Dumbauld regarding a clause that slips into a contract after an express agreement by the parties to remove it, Professor Braucher said:

Judge Dumbauld, my thinking was exactly your thinking, and I was persuaded as I went along that all the cases that I thought of along that line were cases for reformation, so we didn’t need to cover them specially, and the danger of invalidating novel clauses in standard forms was too great under the formulation I had, and that, really, there needs to be an additional factor, and that’s what Mr. Willard was supplying. I think your case would be a fairly standard case of reforming the agreement to conform to the actual agreement. This is sort of a “mistake of the scrivener” kind of case.

Id. at 534.

13. A transcript from the 1970 ALI meeting shows the following exchange:

PROFESSOR BRAUCHER: As I read Mr. Willard’s formulation, it doesn’t require the impossible showing of what the party would have done if. What it requires is that the stronger party, who submits the adhesion contract or prepares the standard form, have reason to believe that the party would not assent if he knew about this. I think it’s an impossible burden of proof to put on somebody that he would have refused to sign if he had known about this. All this requires is that there be reason to believe that that’s so. If so, the obvious remedy is to flag it in some way.

PROFESSOR FARNSWORTH: The only example that comes easily to my mind is a now out-of-date example, but take the signature card that contains a clause with relation to stop orders, which was once very popular. If that were on the back, it would seem to me that virtually no customer could have been found who would have been prepared to enter into an agreement because it

argued that it should not be enough that a contractual term was unexpected. One who would escape from a contract would also have to prove that the drafter had reason to believe that if the person signing the contract had known of the term, he would have found the term so repugnant that the "bad" would have outweighed the "good" and he would have refused to sign.

Applied rigorously, these conditions make section 211(3) of the *Restatement* quite different from either UNIDROIT Principles article 2.20 or Revised 2-206(a). For example, many of us might object to a short statute of limitations or to a disclaimer of the implied warranty of merchantability, yet few of us refuse to sign contracts that contain those terms. We know that the probability of asserting a claim against a seller where these terms would become important is so low that we are willing to take that risk. On the other hand, if we had merely to show that we regarded the term as "unexpected," we might be able to make a case.

Revised 2-206(a) has not escaped the attention of opponents among the Commissioners on Uniform State Laws.¹⁴ The provision was originally proposed for adoption as one of three alternatives.¹⁵ A vote to remove its

contained such a clause, and therefore it would be easy to show that under Mr. Willard's test most anyone would have signed it even if he had known of the clause. On the other hand, under your test, the original test, it would not be a part of the agreement, and it seems to me that, assuming this is a clause which the party signing would not be expected to come across, for the reason that it would be taken back, your original rule is a better rule.

MR. WILLARD: I think the answer may be, sir, that many of us have signed contracts containing provisions that we wish weren't in there, but on balance we thought: All right, we want the contract, and we have to take the good with the bad. And I want to make it as clear as I can that when you get into the area of unconscionability, then you are under [*Restatement (Second) of Contracts* section] 234 [now section 208].

Id. at 528.

14. See Memorandum from Richard G. Speidel, Reporter, to Article 2 Drafting Committee 6 (Aug. 1, 1996) (discussing Revised section 2-206(b)) [hereinafter Speidel Memorandum of Aug. 1996], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Jan. 10, 1997).

15. See Oct. 1995 Draft, Art. 2, *supra* note 3, § 2-206.

(a) Except as provided in subsection (b), if all or part of the agreement of the parties is represented by a standard form and prior to or within a reasonable time after the agreement, the party who did not prepare the standard form manifests assent to it by conduct or by signing the standard form after having had an opportunity to review the form, the party manifesting assent to the standard form

Alternative A

adopts all of the terms of the standard form except terms that are unconscionable.

Alternative B

adopts all of the terms of the standard form except terms that the party who prepared the form knew would cause the other party to refuse the contract if the terms were brought to the attention of that party and the term was not brought to that party's attention.

predecessor (then section 2-206(b)) from Revised 2-206 failed to achieve a majority at the July 1996 annual meeting of the National Conference of Commissioners on Uniform State Laws ("NCCUSL").¹⁶

As in every such debate, the interested parties can be expected to make diametrically opposed forecasts about the empirical impact of the proposed provision on the behavior of courts, consumers, and merchants. One can imagine the advocates of this provision arguing that its consequences will be insignificant. These advocates will point out that there is a similar—though somewhat different—provision in section 211(3) of the *Restatement (Second) of Contracts*. They will note that section 211(3) has slumbered peacefully for more than fifteen years in the *Restatement* without causing difficulty to buyers, sellers, or any other commercial parties. They will also note that Revised 2-206(a) covers the same ground covered by the doctrine of unconscionability and will argue that terms that will be thrown out under Revised 2-206(a) could also be defeated as unconscionable.

Lenders, lessors, and sellers, on the other hand, are likely to maintain that under Revised 2-206(a) no form contract, whether a retail sales contract of Sears, a rental contract by Hertz, or a lease by the General Motors Acceptance

Alternative C

adopts all of the terms of the standard form except terms that the party who prepared the form had reason to know would cause the other party to refuse the contract if the terms were brought to the attention of that party and the terms was [sic] not brought to that party's attention.

(b) No term in a standard form to which a consumer has manifested assent by conduct or by signing the standard form or otherwise is part of the agreement if the consumer could not reasonably have expected it, unless it has been expressly agreed to by the consumer. In determining whether a term is of such a character regard shall be had to the content, language and presentation.

(c) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form and without regard to whether the party actually read the form.

Id.

The definition of "manifests assent" was given in October 1995 section 2-102(29):

A party "manifests assent" to a record if, after having an opportunity to review the terms of the record, the party engages in conduct that constitutes assent to . . . the terms of the record and the party had an opportunity to decline to engage in the conduct.

Id.

The definition of "opportunity to review" was given in October 1995 section 2-102(31):

A party has an "opportunity to review" the terms of a record if the record is made available to the party before the party's acquisition of goods in a manner designed to call the terms to the attention of the party assenting to the record, or is provided in such a manner that the terms will be conspicuous in the normal course of initial use or preparation to use the goods.

Id. § 2-102(31).

16. See Speidel Memorandum of Aug. 1996, *supra* note 14, at 6.

Corporation ("GMAC"), will be safe from challenge. These merchants will see consumer hordes set free from their legitimate contractual obligations and swarms of plaintiffs' lawyers filing class actions against the likes of Sears, GMAC, and Hertz. Acknowledging that few of us read form contracts, the merchants will maintain that a cornerstone of American jurisprudence is the fiction that a signer has read his contract and is therefore bound.

Anticipating these arguments and wondering where the truth lies, I decided to look at the cases under *Restatement* section 211(3) as a way of testing the validity of the arguments. Initially, I discovered approximately forty-three cases that had interpreted section 211(3) in the United States.¹⁷ To

17. Included in my research were cases that cited *Restatement (Second) of Contracts* section 211(3) (1981) in the majority opinion. Not included were cases which cited to the tentative draft section 237 of the *Restatement* (which later became section 211) or which cited to section 211 only in dissenting or concurring opinions. Searches were run on Lexis and Westlaw using the following query: ((RESTATEMENT OR "REST") +1 (SECOND OR "2D") +2 CONTRACT!) AND ((RESTATEMENT OR "REST")/6 "211"). Also, the appendices to *Restatement (Second) of Contracts* were used to check the list for completeness. The cases meeting our requirements were as follows: *Hartford Accident & Indem. Co. v. Lyons Plastering, Inc.*, 974 F.2d 1342, 1992 WL219073 (9th Cir. 1992) (decision without published opinion); *Chicago & N.W. Transp. Co. v. Emmet Fertilizer & Grain Co.*, 852 F.2d 358 (8th Cir. 1988); *Lowey v. Watt*, 684 F.2d 957 (D.C. Cir. 1982); *Aetna Cas. & Sur. Co. v. Dannenfeldt*, 778 F. Supp. 484 (D. Ariz. 1991); *Interpool, Ltd. v. Central Gulf Lines, Inc.*, No. 81 Civ. 6454 (PNL), 1983 WL 584 (S.D.N.Y. July 30, 1983); *Thompson v. Anderson*, 824 P.2d 712 (Alaska 1992); *Lauvetz v. Alaska Sales and Serv.*, 828 P.2d 162 (Alaska 1991); *State Farm Mut. Auto. Ins. Co. v. Falness*, 872 P.2d 1233 (Ariz. 1994) (question certified by Ninth Circuit Court of Appeals); *Averett v. Farmers Ins. Co.*, 869 P.2d 505 (Ariz. 1994); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992); *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277 (Ariz. 1987); *State Farm Mut. Auto. Ins. Co. v. Bogart*, 717 P.2d 449 (Ariz. 1986); *Gilbreath v. St. Paul Fire & Marine Ins. Co.*, 685 P.2d 729 (Ariz. 1984); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984); *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 877 P.2d 1345 (Ariz. Ct. App. 1994); *Services Holding Co., Inc. v. Transamerica Occidental Life Ins. Co.*, 883 P.2d 435 (Ariz. Ct. App. 1994); *Maxwell v. Fidelity Fin. Servs.*, 880 P.2d 1090 (Ariz. Ct. App. 1993); *Pruett v. Farmers Ins. Co.*, 857 P.2d 1301 (Ariz. Ct. App. 1993); *Angus Med. Co. v. Digital Equip. Corp.*, 840 P.2d 1024 (Ariz. Ct. App. 1992); *Do v. Farmers Ins. Co.*, 828 P.2d 1254 (Ariz. Ct. App. 1991); *Broemmer v. Otto*, 821 P.2d 204 (Ariz. Ct. App. 1991); *Shade v. United States Fidelity & Guar. Co.*, 801 P.2d 441 (Ariz. Ct. App. 1990); *State Farm Fire & Cas. Co. v. Powers*, 786 P.2d 1064 (Ariz. Ct. App. 1989); *State Farm Mut. Auto. Ins. Co. v. Dimmer*, 773 P.2d 1012 (Ariz. Ct. App. 1988); *Green v. Mid-America Preferred Ins. Co.*, 751 P.2d 581 (Ariz. Ct. App. 1987); *Rocz v. Drexel Burnham Lambert, Inc.*, 743 P.2d 971 (Ariz. Ct. App. 1987); *DeTemple v. Southern Ins. Co.*, 740 P.2d 500 (Ariz. Ct. App. 1987); *Van Sickle v. Farmer's Ins. Co.*, 738 P.2d 1140 (Ariz. Ct. App. 1987); *Security Ins. Co. v. Andersen*, 763 P.2d 251 (Ariz. Ct. App. 1986); *United Fence Co. v. Great-West Life Assurance Co.*, 723 P.2d 722 (Ariz. Ct. App. 1986); *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277 (Iowa 1995); *Bond Bros. v. Robinson*, 471 N.E.2d 1332 (Mass. 1984); *Magliozzi v. P & T Container Serv. Co.*, 614 N.E.2d 690 (Mass. App. Ct. 1993); *Chase Commercial Corp. v. Owen*, 588 N.E.2d 705 (Mass. App. Ct. 1992); *Walker v. V & V Constr. Co.*, 545 N.E.2d 1192 (Mass. Ct. App. 1989); *Truck Ins. Exch., Inc. v. Vassholz*, 839 S.W.2d 22 (Mo. Ct. App. 1992); *Max True Plastering Co. v. United States Fidelity & Guar. Co.*, 912 P.2d 861 (Okla. 1996); *St. Paul Fire & Marine Ins. Co. v. Russo Bros., Inc.*, 641 A.2d 1297 (R.I. 1994); *Allen v. Prudential Property and Cas. Ins. Co.*, 839 P.2d 798

my surprise, over half of those cases (twenty-five) came from Arizona.¹⁸ Understanding that Revised 2-206(a) would become the law of every jurisdiction and thus much more apparent to lawyers and judges in every jurisdiction than an obscure provision in the *Restatement* has been, I decided to analyze the appellate decisions in Arizona, where lawyers and judges—and particularly the Supreme Court—have formally embraced section 211(3). While the Arizona cases are not a perfect laboratory for determining the impact of Revised 2-206(a), they are the best we have.

Most, but not all, of the cases in Arizona involve contracts that govern liability for torts, namely contract coverage disputes between insurers and their insureds. I believe that these cases do give insight about how a court may respond when it is asked to determine what one could “reasonably have expected.” They give some idea about the kinds of cases where these arguments will be made and suggest the kind of discretion that Revised 2-206(a) will give to judges.

Consider the Arizona cases with due recognition of the fact that they are interpreting section 211(3) of the *Restatement*, and not Revised 2-206(a), and with the understanding that the sample consists of twenty-five cases, only seven of which come from the Arizona Supreme Court led by a powerful Justice who had a clear vision about the evils of form contracts. Understand too that most of them involve insurance disputes. Although each of these qualifications might make the Arizona experience unrepresentative, it is the best we have, and I, at least, find it instructive.

II. THE ARIZONA CASES

Since 1984, the appellate courts in Arizona have handed down twenty-five decisions that rely on section 211(3).¹⁹ I examine in detail the seven decisions

(Utah 1992); *Wagner v. Farmers Ins. Exch.*, 786 P.2d 763 (Utah Ct. App. 1990); see also *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 786 (Iowa 1988) (erroneously cited as § 237); *Lepic v. Iowa Mut. Ins. Co.*, 402 N.W.2d 758, 761 (Iowa 1987) (same); *Cairns v. Grinnell Mut. Reins. Co.*, 398 N.W.2d 821, 825 (Iowa 1987) (same).

18. See *Lyons Plastering*, 974 F.2d 1342; *Dannenfeldt*, 778 F. Supp. 484; *Falness*, 872 P.2d 1233; *Averett*, 869 P.2d 505; *Broemmer*, 840 P.2d 1013; *Gordinier*, 742 P.2d 277; *Bogart*, 717 P.2d 449; *Gilbreath*, 685 P.2d 729; *Darner*, 682 P.2d 388; *Aiken*, 877 P.2d 1345; *Services Holding*, 883 P.2d 435; *Maxwell*, 880 P.2d 1090; *Pruett*, 857 P.2d 1301; *Angus Med.*, 840 P.2d 1024; *Do*, 828 P.2d 1254; *Otto*, 821 P.2d 204; *Powers*, 786 P.2d 1064; *Shade*, 801 P.2d 441; *Dimmer*, 773 P.2d 1012; *Green*, 751 P.2d 581; *Rocz*, 743 P.2d 971; *DeTemple*, 740 P.2d 500; *Van Sickel*, 738 P.2d 1140; *Andersen*, 763 P.2d 251; *United Fence*, 723 P.2d 722.

19. See cases cited *supra* note 17.

decided by the Supreme Court of Arizona.²⁰ Of those seven cases, six involved terms in insurance contracts,²¹ while one involved an arbitration clause in a consumer's contract with an abortion clinic.²² In five of the cases, the Arizona Supreme Court reversed a decision below for the drafter of the form contract.²³ In two cases, the outcomes were ambiguous.²⁴ In short, there were no clear wins in the Arizona Supreme Court for the drafters. If the Arizona cases foretell the future of form contracts, sellers, lessors, lenders and the many others whose agreement may fall under Revised 2-206 and 2A-206 have justified trepidation about the Uniform Commercial Code's recognition of the doctrine of "reasonable expectations" in those provisions.

Because six out of the seven Arizona cases (and a similar percentage of the cases in the Arizona Court of Appeals) involve insurance contracts,²⁵ one might argue that they do not bear the same threat to other standardized contracts that they bear to insurance policies. In support of this argument, one might note that the doctrine of reasonable expectations exists in the "insurance law" of many states. In those states, courts routinely bend insurance policies to their will by conforming them to the "reasonable expectations" of the insured under a specialized doctrine dealing with insurance policies.²⁶ Those cases rarely cite or rely on section 211(3). It is possible that something unique in insurance contracts engenders a pervasive

20. *Falness*, 872 P.2d 1233; *Averett*, 869 P.2d 505; *Broemmer*, 840 P.2d 1013; *Gordinier*, 742 P.2d 277; *Bogart*, 717 P.2d 449; *Gilbreath*, 685 P.2d 729; *Darner*, 682 P.2d 388.

21. *See Falness*, 872 P.2d 1233; *Averett*, 869 P.2d 505; *Gordinier*, 742 P.2d 277; *Bogart*, 717 P.2d 449; *Gilbreath*, 685 P.2d 729; *Darner*, 682 P.2d 388.

22. *See Broemmer*, 840 P.2d 1013.

23. *See Averett*, 869 P.2d 505; *Broemmer*, 840 P.2d 1013; *Gordinier*, 742 P.2d 277; *Bogart*, 717 P.2d 449; *Darner*, 682 P.2d 388.

24. *See Broemmer*, 840 P.2d 1013; *Gilbreath*, 685 P.2d 729.

25. *See supra* note 20 and accompanying text. A majority of those cases heard only by the Arizona Court of Appeals also involved insurance contracts. *See Services Holding Co. v. Transamerica Occidental Life Ins. Co.*, 883 P.2d 435 (Ariz. Ct. App. 1994); *Pruett v. Farmers Ins. Co.*, 857 P.2d 1301 (Ariz. Ct. App. 1993); *Do v. Farmers Ins. Co.*, 828 P.2d 1254 (Ariz. Ct. App. 1991); *State Farm Fire & Cas. Co. v. Powers*, 786 P.2d 1069 (Ariz. Ct. App. 1990); *Shade v. United States Fidelity & Guar. Co.*, 801 P.2d 441 (Ariz. Ct. App. 1990); *State Farm Mut. Auto. Ins. Co. v. Dimmer*, 773 P.2d 1012 (Ariz. Ct. App. 1989); *Green v. Mid-America Preferred Ins. Co.*, 751 P.2d 581 (Ariz. Ct. App. 1988); *DeTemple v. Southern Ins. Co.*, 740 P.2d 500 (Ariz. Ct. App. 1987); *Van Sickle v. Farmers Ins. Co.*, 738 P.2d 1140 (Ariz. Ct. App. 1987); *Security Ins. Co. v. Andersen*, 763 P.2d 251 (Ariz. Ct. App. 1986); *United Fence Co. v. Great-West Life Assurance Co.*, 723 P.2d 722 (Ariz. Ct. App. 1986).

26. *See, e.g.*, *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 169 (Cal. 1966) (testing the meaning of insurance policy "according to the insured's reasonable expectation of coverage"). *See generally* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970); John L. Romaker & Virgil B. Prieto, *Expectations Lost: Bank of the West v. Superior Court Places the Fox in Charge of the Henhouse*, 29 CAL. W. L. REV. 83 (1992) (footnote omitted).

judicial hostility. Arguably, such judicial hostility accounts for the results not only in other states but also in Arizona.

Standing against that argument is the fact that the Arizona Supreme Court has been meticulous, elaborate, and explicit in its reliance on section 211(3) and unceasing in its denial that the doctrine is an “insurance only” rule. In *Darner Motor Sales Inc. v. Universal Underwriters Insurance Co.*,²⁷ the court cites Professor Kenneth Abraham’s assertions that insurance law is becoming part of the “mainstream” and that a general principle authorizing courts to honor reasonable expectations is “emerging.”²⁸ Justice Feldman, the author of *Darner*, reaches beyond Professor Abraham, noting that “[e]mergence” is probably an inaccurate description of the use of the reasonable expectations test since, if correctly understood, that doctrine has long been a basic principle in the law of contracts.²⁹ The court quotes Professors Corbin³⁰ and Llewellyn³¹ and then sets out section 211 of the *Restatements* in full.³² Justice Feldman denies that “[t]his treatment of insurance law is . . . radical [or] new.”³³

The *Darner* opinion reminds one of the activist decisions of the 1960s and 1970s written by Justice Traynor in California,³⁴ Justice Francis in New Jersey,³⁵ and Judge Wright on the Court of Appeals for the District of Columbia.³⁶ It is articulate, thorough, and heavy with references, not only to the case law³⁷ and the *Restatement* and its comments,³⁸ but also to the academic literature.³⁹ In many different ways, the Arizona Supreme Court is at pains to explain that it is applying the *Restatement* doctrine, a term of the

27. 682 P.2d 388 (Ariz. 1984).

28. *Id.* at 399 (discussing Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981)).

29. *Id.*

30. *Id.* at 394-95 (quoting 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1, at 2 (1963)).

31. *Id.* at 395 (quoting KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960)).

32. *Id.* at 396 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981)).

33. *Id.* at 397.

34. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962).

35. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

36. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

37. See, e.g., *Darner*, 682 P.2d at 394-95 (citing *Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441 (Ariz. 1982); *Sparks v. Republic Nat'l Life Ins. Co.*, 647 P.2d 1127 (Ariz. 1982)).

38. See, e.g., *id.* at 396-97 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 & cmts. a, c, f (1981)).

39. See, e.g., *Darner*, 682 P.2d at 394 (citing Abraham, *supra* note 28, at 1151; Keeton, *supra* note 26, at 972; John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975)).

general contract law, not a doctrine unique to or limited in any way to insurance contracts.

That Justice Feldman may be fairly labeled an activist is shown by the fact that the appellant in *Darner* did not cite or rely upon section 211(3). Justice Feldman recognized section 211(3) as a “basic contract principle” in Arizona without help from the advocates in that case.

Consider now the seven Arizona Supreme Court cases on section 211(3), starting with *Darner*. Darner Motors was in the automobile sales and leasing business. Its insurance had limits of \$100,000 for injury to one person and \$300,000 for more than one person on its own vehicles.⁴⁰ The insurance policy covering lessees of automobiles had limits of \$15,000 and \$30,000.⁴¹ When it shifted its policies from Travelers to Universal, Darner dealt with Doxsee, a full-time employee of Universal. Darner claimed that he read his “U-drive” policy for lessees, noted that there were limits of coverage of \$15,000 and \$30,000 for lessees’ liability to third parties and called Doxsee about that coverage.⁴² Darner claimed to be concerned because his rental contract represented to his lessees that their coverage extended to \$100,000 and \$300,000, and because he believed it would be better for his business to offer lessees the higher coverage.⁴³ On deposition Darner and one of his employees testified that Doxsee had told Darner not to worry about the limits because another policy, the “all-risk umbrella” policy, would cover his lessees’ liability to third parties up to \$100,000 and \$300,000.⁴⁴ Doxsee did not remember the conversation, but was “quite sure” that he could not have told Darner any such thing.⁴⁵ Darner’s testimony was impeached by evidence that he *later* changed his rental form to show only \$15,000 and \$30,000, not \$100,000 and \$300,000 as it formerly read.⁴⁶ Ultimately, Darner received a copy of the umbrella policy but denied reading it, testifying that to have done so would have been “like reading a book.”⁴⁷

About two years after purchasing insurance from Universal, Darner rented a car to Duane Crawford. The rental agreement contained a representation of

40. *Id.* at 390.

41. *Id.*

42. *Id.*

43. *Id.* It is unclear whether Darner Motors had higher limits for lessees under its insurance from The Travelers Co., which the insurance from Universal replaced in 1975. *See id.*

44. *Id.*

45. *Id.* at 390 n.3.

46. *Id.*

47. *Id.* at 391 (quoting Darner’s testimony).

coverage in the amount of \$100,000 and \$300,000⁴⁸—possibly a fraudulent representation, depending on Darner’s true understanding of his insurance coverage. Crawford struck a pedestrian and caused severe injuries. The pedestrian sued Crawford, who sought coverage from Universal.⁴⁹ Universal only paid \$15,000 under the U-drive policy, and Crawford sued Darner to recover the remainder of the pedestrian’s judgment.⁵⁰ Universal moved for summary judgment on the ground that the umbrella policy provided no coverage for lessees. The trial court granted summary judgment to the insurer and the court of appeals affirmed.⁵¹ Because the umbrella policy was not part of the record, and because the trial court did not quote the clause that apparently excluded coverage for lessees, it is impossible to know exactly what the policy said.

Because Darner never claimed that the umbrella policy was ambiguous, and because the court of appeals stated the question as whether one can expand an insurance liability “beyond the terms of the . . . policy issued,”⁵² one must assume that the policy was clear. Evidently, it had a definition of “insureds” which did not include lessees.⁵³

The Arizona Supreme Court reversed the affirmance of the summary judgment by the court of appeals.⁵⁴ On retrial, Darner could put forth his estoppel, fraud, and contract reformation claims unfettered by the umbrella policy’s exclusion of lessees.⁵⁵

Note that the case does not depend upon ambiguity in or the inconspicuousness of the standardized terms. It instead depends entirely upon the fact that Doxsee, the insurer’s agent, allegedly made representations to Darner upon which Darner, having never read the insurance contract, relied. Recall too that Darner was a businessman, not a consumer.

The second section 211(3) case to come to the supreme court, *Gilbreath v. St. Paul Fire and Marine Insurance Co.*,⁵⁶ involved a claim against an insurance company to recover damages for the sexual assault of a child in a childcare facility. The plaintiff stated two claims, one on behalf of the child

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 391-92.

53. This statement is precisely what Universal claimed. *Id.* at 391.

54. *Id.* at 405.

55. The Arizona Supreme Court’s reversal occurred on all these claims. *Id.*

56. 685 P.2d 729 (Ariz. 1984).

for her personal injury arising from the sexual assault and another for the emotional distress that the mother suffered upon learning that her child had been sexually molested.⁵⁷ The childcare center's insurance policy excluded "coverage . . . for bodily injury to persons . . . in [the] care, custody or control of the Insured."⁵⁸ Apparently, this exclusion was typed; it was not part of the boilerplate and was "prominently displayed."⁵⁹ The Arizona Supreme Court rejected the argument that the insurance policy was ambiguous. The court noted that the agreement and endorsements were clear when read together and that these were apparently "negotiated terms" of the policy.⁶⁰ The court therefore affirmed the appellate court's decision that the policy's exclusion applied to the claim of the child and that there was no coverage for her loss.⁶¹

The court concluded, however, that coverage for the emotional loss to the mother was not excluded.⁶² Depending upon the measure of damages for the mother's emotional injury, the insurance company may have won a hollow victory with respect to the child's claim. Because of the court's conclusion in favor of the mother the case cannot be regarded as a clear victory for the insurance company. It is the only case among the seven before the Arizona Supreme Court in which it decided any significant issue in favor of the drafter of a form contract after a lower court decision for the drafter on that issue.

In retrospect *Gilbreath* is unremarkable: the relevant term was specifically negotiated, separately typed, and arguably not even part of the "standardized form." Putting itself in the shoes of the insurance company, the Arizona Supreme Court noted that it is plausible for an insurer to withhold insurance coverage in a case like *Gilbreath*. The court acknowledged that "an insurer could be quite reluctant to indemnify the proprietor of a childcare center against the frightening panorama of liability inherent in assuming the duty of care and supervision over a large number of preschool children."⁶³ Because *Gilbreath* deals with a bargained term and not a standard term, perhaps the case should be omitted from the seven.

In its third case *State Farm Mutual Automobile Insurance Co. v. Bogart*,⁶⁴ the Arizona Supreme Court reversed a decision of the court of appeals in

57. See *id.* at 730-34.

58. *Id.* at 730 (quoting from the insurance policy).

59. *Id.*

60. *Id.* at 731-32.

61. *Id.* at 732.

62. *Id.* at 733-34.

63. *Id.* at 732.

64. 717 P.2d 449 (Ariz. 1986).

favor of the insurance company. Like *Darner*, this case arose from the negligent behavior of a lessee. John May, an employee of Xerox, rented a car from Hertz.⁶⁵ Hertz was required by statute to provide liability insurance, but avoided the requirement by qualifying under Arizona law as a “self-insurer.”⁶⁶ Xerox had purchased from the Employers Insurance Company of Wausau, a policy that covered all of its employees while they were driving cars on company business, and May himself had purchased a State Farm policy that covered him while he was driving rental vehicles.⁶⁷

The plaintiffs in *Bogart* recovered a judgment of \$609,198 against May.⁶⁸ Hertz settled with them for \$200,000 and obtained an agreement that they would not go after May’s personal assets.⁶⁹ The Employers policy had limits of \$500,000, and May’s personal State Farm policy had limits of \$200,000.⁷⁰ The trial court found that both Employers and State Farm were primary carriers and that the remaining balance of the judgment (after Hertz had paid) should be prorated between them.⁷¹

The court of appeals found that Hertz was the primary insurer, that State Farm and Employers were “excess carriers,” and that the State Farm “other insurance” clause freed it from any liability until the Employers policy paid its full limits.⁷² The Employers policy stated that its coverage was “excess” over any other insurance coverage, thus purporting to force the lessee’s individual insurance policy to pay first.⁷³ The State Farm policy had an excess or exclusion clause for nonowned vehicles “if there was any other coverage.”⁷⁴ The court of appeals characterized the State Farm clause as not merely an excess clause but as an “escape” clause precisely because it gave no coverage to nonowned vehicles if there was any other insurance. Arguably, coverage under the State Farm policy was not just excess because it would have disappeared if there had been even one dollar of other insurance.

Conflict between versions of “other insurance” clauses is a well-known

65. *Id.* at 450.

66. *Id.*

67. *Id.*

68. *Id.* at 451.

69. *Id.* at 450-51.

70. *Id.* at 451.

71. *Id.* The trial court ordered State Farm to pay two-sevenths of the balance and Employers five-sevenths of the balance. *Id.*

72. *Id.*

73. *Id.* at 452.

74. *Id.*

and frequently litigated issue in insurance law.⁷⁵ In reversing the court of appeals' judgment and reinstating the trial judge's conclusion that both State Farm and Employers were primary insurers, the Arizona Supreme Court relied upon section 211(3). The court noted that State Farm's "other insurance" clause was "non-standard" and appeared in the "policy conditions" and not on the declaration page.⁷⁶ As a result, one had to dig deep into the policy to find the term. The court held that the trial court did not err in concluding that the exclusion upon which State Farm relied was "ambiguous."⁷⁷ Moreover, the court found that May and "[m]ost informed policyholders would be shocked to discover that the substantial protection which they had purchased was reduced to the \$15,000 minimum statutory coverage whenever they drove a rented car."⁷⁸ The court then concluded that between May and State Farm the proper interpretation of the latter's insurance policy was that the escape clause was unenforceable.⁷⁹

Remember that May had no direct interest in this litigation because he was personally discharged with Hertz's payment. The plaintiffs, too, had no interest in this litigation, because the policy limits of the Employers policy were large enough to satisfy their claim. By the time the case reached the Arizona Supreme Court, it was purely a conflict between two insurance companies about which of them would pay what part of the judgment. The court decided that the fact that the clause would not be enforceable against May should be given "great weight" in determining whether the clause was enforceable against a person who did not sign it, namely Employers.⁸⁰

Bogart goes beyond *Darner* in several ways. First, there is no evidence that an insurance agent or any other person representing State Farm orally misrepresented or exaggerated the coverage under the policy. The Arizona Supreme Court relied upon the "ambiguity" and complexity of the policy in determining that the "other insurance" clause would not be enforceable against May.⁸¹ Second, the court was willing to assert that most informed

75. See, e.g., *State Farm Mut. Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 490 F.2d 407 (4th Cir. 1974); see also Frederick G. Boynton, Comment, *Double Insurance Coverage in Automobile Insurance Policies—The Problem of "Other Insurance" Clauses*, 47 TUL. L. REV. 1039, 1043-46 (1973).

76. *Bogart*, 717 P.2d at 457.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

policyholders would be “shocked” to find that they only had a minimum statutory coverage when they drove a rented car.⁸² However, there is no suggestion in the case that May ever actually expressed such surprise or shock or that any evidence was put before the court to support its conclusion about consumers at large.

In some ways *Bogart* is the most remarkable of the seven decisions. The Arizona Supreme Court applied the “other insurance” clause against State Farm and in favor of Employers based not on Employers’ surprise or reasonable expectations, but based on the surprise and reasonable expectations of its signer, May. Yet neither May nor the plaintiffs in the underlying lawsuit had an interest in the outcome. Employers, the beneficiary of the favorable interpretation against State Farm, was not surprised. Employers and every other insurance company know and therefore “reasonably expect” that an “other insurance” clause is designed to minimize the drafter’s losses and to cast them on other insurers. Because the principal consequence of an “other insurance” clause is to determine what part of the loss will be borne by different insurers, it is unclear why the reasonable expectations of the insured should be relevant at all—unless the consequence of interaction between the other insurance policies means that some part of the loss will fall on him.

In the fourth case, *Gordinier v. Aetna Casualty & Surety Co.*,⁸³ the Arizona Supreme Court again reversed the Arizona Court of Appeals. The court of appeals had affirmed a summary judgment in favor of the insurance company.⁸⁴ Shawn Gordinier bought a policy from Aetna that listed him as the “named insured.”⁸⁵ The policy covered injury caused by an uninsured motorist only if the injured party was a “covered person.”⁸⁶ A covered person was defined to mean the named insured and a “spouse [of the named insured] if a resident of the same household.”⁸⁷ Under some conditions the family members of the named insureds were covered but only as long as they were residents in the same household.⁸⁸

About a year and a half after Shawn and his wife Tina separated, Tina was

82. *Id.*

83. 742 P.2d 277 (Ariz. 1986).

84. *Id.* at 279.

85. *Id.* at 278-80.

86. *Id.* at 280.

87. *Id.*

88. *Id.*

injured in an accident while riding on the back of a friend's motorcycle. Her friend had no insurance.⁸⁹ When Tina made a claim against Shawn's insurance company for uninsured motorist liability, the company responded that she was not entitled to coverage because she no longer lived in the household of the named insured, Shawn.⁹⁰ The court of appeals agreed.

In refusing to uphold the terms of the Aetna policy, the Arizona Supreme Court noted first that the exclusion was "inconspicuous" and that "the relevant terms were scattered over the policy."⁹¹ The court questioned whether "the average consumer attempting to check on his or her rights could readily understand them."⁹² Second, the court suggested that the different treatment of spouses "certainly could be deemed unexpected."⁹³ Finally, the court concluded that Shawn and Tina had intended to obtain coextensive coverage and that the exclusion of the latter from the Aetna policy "undercut the purpose of the transaction."⁹⁴

Gordinier presents several interesting questions that are ignored by the court. While Tina was clearly an insured under the Aetna policy as long as she was married to and living with Shawn,⁹⁵ it appears that Shawn made the contract, paid the premiums, and arranged for new coverage when new coverage was needed.⁹⁶ The party "manifesting assent" under section 211(3) was Shawn, not Tina.⁹⁷ Thus, under section 211(3), the insurance company's belief about Shawn's, not Tina's, expectations would be controlling. Under section 211(3), the insurance contract could be overturned only if the insurance company reasonably believed that a person in Shawn's position would not have agreed to the policy had he known of the terms. Because Tina was not the original contracting party, the insurance company's belief about

89. *Id.* at 279.

90. *Id.* Apparently the insurance had been procured with the assistance of Shawn's mother, a clerical employee at two insurance companies during the relevant time period. *Id.* at 278-79. There was a dispute about what Tina said to her mother-in-law and what the mother-in-law said to Tina, but no claim that the mother-in-law was acting as an agent for Aetna. *Id.* at 279.

91. *Id.* at 289.

92. *Id.*

93. *Id.*

94. *Id.* at 285. The court of appeals agreed. The court also pointed out that although Shawn continued to pay the premiums on their joint car after they split, Tina drove that car most of the time. Presumably, the court wishes us to infer that Tina was the de facto insured even though she was not so listed on the policy.

95. See *supra* note 87 and accompanying text.

96. *Gordinier*, 742 P.2d at 278.

97. See *supra* note 9 and accompanying text.

her expectations are not relevant.⁹⁸

But put yourself in Shawn's shoes. Would he say—as the court asserts—that “disparate treatment of spouses” is “unexpected”?⁹⁹ Given the choice, would Shawn have claimed that his estranged wife ought to have coverage when she was riding around on the back of her new boyfriend's uninsured hog? I suspect that the Arizona Supreme Court's assumption about the “insured's expectations” was backwards. One need not ascribe unusual motives to Shawn to conclude that he would not have approved of his wife's consorting with a group of bikers. Indeed it would not be too much of a stretch to believe that in his darker moments Shawn might even have wished for a combination of injury to Tina and no applicable insurance coverage.

Of the seven cases under consideration here, *Gordinier* best illustrates the broad discretion that section 211(3) gives to a court even when the inferences that it draws are counterintuitive. Here Justice Feldman put himself in the shoes of the insured and drew a conclusion that is almost certainly contrary to the truth. In the guise of changing a contract because the insurer should have known that the insured would not have signed it, he overturned a contract that may be precisely what the insured would have wanted—no coverage for his estranged wife.

For the first time, in *Broemmer v. Abortion Services of Phoenix, Ltd.*,¹⁰⁰ the Arizona Supreme Court applied the “reasonable expectations” doctrine of section 211(3) to a contract that was not an insurance policy. Seeking an abortion, Melinda Broemmer signed an agreement to arbitrate any dispute that she might have with the abortion clinic or with the performing physician.¹⁰¹ Allegedly as a result of the physician's malpractice, Melinda suffered a perforated uterus.¹⁰² She sued both the physician and the clinic.¹⁰³ The trial court granted summary judgment in favor of the defendants on the ground that the arbitration clause was binding.¹⁰⁴ The Arizona Court of Appeals affirmed the summary judgment,¹⁰⁵ but the Arizona Supreme Court

98. See *supra* note 96 and accompanying text. It is plausible that Tina, had she been the insured, would not have agreed to the insurance contract had she known it would not have covered her when she rode on a friend's motorcycle after leaving Shawn.

99. *Gordinier*, 742 P.2d at 284; see *supra* note 93 and accompanying text.

100. 840 P.2d 1013 (Ariz. 1992). By 1992, Justice Feldman had become the Chief Justice; here the court speaks with the voice of Vice Chief Justice Moeller.

101. *Id.* at 1014-15.

102. *Id.* at 1015.

103. *Id.* at 1013.

104. *Id.*

105. *Id.*

reversed.¹⁰⁶

Ms. Broemmer was twenty-one years old, a high school graduate from Iowa and sixteen or seventeen weeks pregnant.¹⁰⁷ The father of her child insisted that she have an abortion but her parents were against it.¹⁰⁸ Melinda's mother accompanied her to the abortion clinic, where Melinda signed an arbitration agreement specifying that "any dispute aris[ing] between the Parties as a result of the fees and/or services" would be resolved by binding arbitration under a panel appointed by the American Arbitration Association composed of licensed medical doctors specializing in obstetrics and gynecology.¹⁰⁹

Noting that the "[p]laintiff was under a great deal of emotional stress, had only a high school education, was not experienced in commercial matters, and is still not sure 'what arbitration is,'"¹¹⁰ the Arizona Supreme Court concluded that "the contract fell outside of plaintiff's reasonable expectations and is unenforceable."¹¹¹ The court remanded for further proceedings consistent with its opinion,¹¹² but it did not reveal whether it was ordering a new trial on the issue of Melinda's expectations or whether it was directing the trial court summarily to dismiss defendant's motion for arbitration.

By 1992 the "reasonable expectations" doctrine of *Restatement* section 211(3) had become a fixed part of Arizona jurisprudence. Eight years after *Darner*, the Arizona Supreme Court is able to respond to the dissent in *Broemmer* by asserting that the application of section 211(3) is "a well-established principle of contract law; today we merely apply it to the undisputed facts of the case before us."¹¹³ *Broemmer* did not depend so much on the length or complexity of the relevant contract or on the obscurity of its provisions; the court instead focused on the presumed ignorance of the plaintiff and on the confusion and uncertainty that might have arisen out of her emotional distress.¹¹⁴ While noting that she could not be presumed to have abandoned her fundamental right to a jury trial, the court accepted at face

106. *Id.* at 1018.

107. *Id.* at 1014.

108. *Id.*

109. *Id.* at 1014-15 (brackets in original).

110. 840 P.2d 1013, 1017 (1992).

111. *Id.*

112. *Id.* at 1018.

113. *Broemmer*, 840 P.2d at 1018.

114. See *supra* note 110 and accompanying text.

value her assertion that she did not know what arbitration was.¹¹⁵ Did the court infer that she knew what a jury trial was and that she regarded it as a fundamental right?¹¹⁶

Even if Melinda were a particularly precocious twenty-one-year-old, it is unlikely that she had any firm views about the virtues or vices of arbitration as compared with a jury or judge trial.¹¹⁷ The Arizona Supreme Court did something in measuring Melinda's expectations that it did not do in any of the previous insurance cases. It treated Melinda as if she were an informed person and would have concluded that she would get a larger award before a jury than before a panel of physicians. Having been so informed, the court found that she would have rejected arbitration and insisted on a contract that would have allowed her to present her case to a jury.¹¹⁸ By contrast, in the insurance cases, the court examined the contracting parties' minds in the raw. Never did it suggest that an insured—understanding the rationale for the household exclusion and the appropriate premium for liability insurance without that exclusion—would have knowingly signed that contract. The court dismissed such possibilities by simply asserting that the uninformed purchaser of insurance would have been unwilling to sign a contract with a household exclusion or the like. In short, the court treated each insured as completely ignorant of the consequences and purposes of such insurance clauses. In *Broemmer*, on the other hand, the court treated Melinda as if she were informed about the practical consequences of arbitration as opposed to a jury trial.¹¹⁹

The dissent in *Broemmer* recounted the modern interest in alternative dispute resolution and noted arbitration's rebirth¹²⁰ under the Federal Arbitration Act¹²¹ and the endorsement of the United States Supreme Court.¹²²

115. *Broemmer*, 840 P.2d at 1017.

116. Note that the reference in the case to the formation of the arbitration panel of all obstetricians or gynecologists, *id.*, is a thinly veiled expression that physicians could not fairly evaluate the case and could not properly set a just recovery. *See id.*

117. The amici who appeared on Melinda's behalf, however, knew the virtue of a jury trial against an abortion clinic. The amici were the National Association of Trial Lawyers of America and the Arizona branch of the Trial Lawyers. *Id.* at 1014.

118. *See supra* note 114 and accompanying text.

119. *See supra* notes 116-17 and accompanying text.

120. *Broemmer*, 840 P.2d at 1019 & n.1 (Martone, J., dissenting).

121. Ch. 392, 61 Stat. 670 (codified at 9 U.S.C. § 2 (1994)).

122. *See generally* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

In the words of the dissent arbitration is “hardly bizarre or oppressive”; it is the “preferred method of alternative dispute resolution that [the Arizona] legislature has expressly acknowledged,” and it neither “eviscerate[s] any agreed terms” nor “eliminate[s] the dominant purpose of the transaction.”¹²³ Moreover, the arbitration agreement was “legible,” not “hidden from plaintiff’s view,” and “in bold capital letters.”¹²⁴ In a particularly cute twist, the dissent also noted the affirmation of arbitration in the *Restatement (Second) of Contracts* itself.¹²⁵

As a way of testing the wisdom of *Broemmer*, consider how far it goes beyond conventional rules on unconscionability. Despite her emotional turmoil, Melinda, an Iowa high school graduate, could surely read. The terms were in bold capital letters,¹²⁶ and Melinda was accompanied to the clinic by her dubious mother.¹²⁷ There was no procedural unconscionability. Because the terms provided for arbitration¹²⁸ and no more, the agreement could not be called substantively unconscionable. It is possible that the physicians on the arbitration panel might have been embarrassed by the botched abortion¹²⁹ and might have chosen to give Melinda substantial damages. It is quite unlikely that Melinda could have satisfied either part of the standard unconscionability test, yet in the majority’s view she easily satisfied section 211(3).¹³⁰ Here then we have a case that involved neither oral assertions of the kind alleged in *Darner* nor obscure and complicated provisions of the kind found in *Bogart* and *Gordinier*, but still a violation of section 211(3).

After *Broemmer* came *Averett v. Farmers’ Insurance Company*¹³¹ where

123. *Broemmer*, 840 P.2d at 1020 (Martone, J., dissenting).

124. *Id.*

125. *Id.* at 1020-21 (Martone, J., dissenting). The dissent was referring to the following excerpt from the *Restatement (Second) of Contracts*:

A particularly important change has been effected by statutes relating to arbitration, which have now been enacted in so many jurisdictions that it seems likely that even in the remaining states, there has been a change in the former judicial attitude of hostility toward agreements to arbitrate future disputes (see *Restatement, Second, Conflict of Laws*, Introductory Note to Topic 5, Chapter 8). Such agreements are now widely used and serve the public interest by saving court time. The rules stated in this Chapter do not preclude their enforcement, even in the absence of legislation.

RESTATEMENT (SECOND) OF CONTRACTS ch. 8, at 4 (1981) (introductory note).

126. *Broemmer*, 840 P.2d at 1018 (Martone, J., dissenting).

127. *Id.* at 1014.

128. Of course, it was arbitration that the court implicitly concluded would be biased against the patient (because the arbitration panel consisted of medical doctors). See *supra* note 115.

129. The doctor had allegedly poked a hole in Melinda’s uterus. See *supra* note 102 and accompanying text.

130. *Broemmer*, 840 P.2d at 1017.

131. 869 P.2d 505 (Ariz. 1994).

the insured challenged a "household exclusion." As in *Gordinier*, the insurance company won summary judgment at the trial court, the Arizona Court of Appeals affirmed,¹³² and the Arizona Supreme Court reversed.¹³³ In *Averett*, two children were seriously injured while they were passengers in a car driven by their mother, Carole, who was killed in the accident.¹³⁴ At trial, the parties stipulated that Carole's negligence caused the accident.¹³⁵ Ray, Carole's husband, sued the insurance company on behalf of himself and his children.¹³⁶ The insurance policy stated that coverage did not apply to liability for "bodily injury to . . . a family member."¹³⁷ Carole, Ray, and the two children were conceded to be members of the same family, so the insurance company denied coverage beyond the statutorily required limit of \$15,000.¹³⁸ The policy's liability limits were \$250,000 per person and \$500,000 per occurrence.¹³⁹ The children's damages exceeded \$500,000.¹⁴⁰

The Arizona Supreme Court reiterated the summary of the section 211(3) rules that it gave in *Gordinier* as follows: "[E]ven unambiguous boilerplate terms" may be invalid under section 211(3) where (1) "the contract terms, although not ambiguous to the court, cannot be understood by the reasonably intelligent consumer"; (2) "the insured did not receive full and adequate notice of the term in question"; (3) "some activity which can be reasonably attributed to the insurer would create an objective impression of coverage"; and (4) "some activity reasonably attributable to the insurer has induced a particular insured reasonably to believe that he has coverage."¹⁴¹

The court then concluded that Ray would have rejected the insurance policy had he known of the household exclusion and that the insurer had known this conclusion to be true because its agent had allegedly known of "Carole's health problems."¹⁴² According to the court, these health problems

132. *Id.* at 506.

133. *Id.* at 509.

134. *Id.* at 506.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* Apparently, in Arizona insurance coverage of \$15,000 cannot be reduced by an exclusion of family members.

139. *Id.*

140. *Id.*

141. *Id.* at 507 (quoting *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277, 283-84 (1987)). It is unclear whether the four situations reiterated in *Averett* are cumulative or disjunctive. For section 211(3) to overturn a term must (1), (2), (3), and (4) be present, or is it enough that some combination of (1) through (4) occurs? I am unsure.

142. *Id.* at 508.

made Ray "concerned about her ability to drive."¹⁴³ The court found Ray's testimony to imply "that had he been advised of the household exclusion, he might have opted to shop elsewhere, or taken other measures."¹⁴⁴ Tragically, the proper measures are now plain enough; Ray should have grounded Carole. How repugnant that a husband concerned about his wife's ability to drive merely asked for more insurance yet permitted his wife to continue to put herself and their children at risk. How bizarre that the Arizona Supreme Court granted insurance coverage despite the fact that the husband had never purchased it and in the face of his own failure to do what he should have done.

The last case of the seven is *State Farm Mutual Automobile Insurance Co. v. Falness*,¹⁴⁵ a 1994 decision on a certified question from the Court of Appeals for the Ninth Circuit. *Falness* arose out of an automobile accident that killed John and Anna Hugg.¹⁴⁶ John was driving and his negligence contributed to the collision. Anna's estate sued State Farm, which argued that there was no liability because both John and Anna were named insureds in the policy and the policy denied coverage for bodily injury to "you."¹⁴⁷ "You" in this case referred to the named insureds—John and Anna.¹⁴⁸ The Ninth Circuit asked whether the reasonable expectations test of section 211(3) would overturn the named insured exclusion.¹⁴⁹ The Arizona Supreme Court responded that section 211(3) might do so, but one could not be certain on the record before it.¹⁵⁰

Presumably, the exclusions involved in *Averett* and *Falness*, the named insured exclusion and the household exclusion, arose out of the certainty that when one family member sues another, the defendant will throw the case whenever the insurance company will pay any judgment. Faced with a trial in which a father's testimony would permit his children to recover from a third party (the insurance company), the insurance company is likely to regard its coverage as first-party health insurance for the children. By hypothesis, almost any family member is likely to shape his or her testimony to the

143. *Id.*

144. *Id.*

145. 872 P.2d 1233 (Ariz. 1994).

146. *Id.* at 1233.

147. *Id.*

148. *Id.*

149. *Id.* at 1234.

150. *Id.* The insured later won before the Ninth Circuit. *State Farm Mut. Auto Ins. Co. v. Falness*, 39 F.3d 966 (9th Cir. 1994) (under Arizona law, section 211(3) invalidates the exclusion clause).

benefit of other family members, so that insurance should not be classified as liability coverage. Only in fiction is this liability dependent on proof of fault.

For anyone with appreciation for trial and settlement dynamics, exclusions of family or named insured plaintiffs would not only be expected but justified and logical. An insurance company's response to a complaint about these exclusions from an insured would be to offer some form of first-party coverage that might include health, disability, and coverage for income loss.

To assert that insureds cannot understand these ideas bespeaks the arrogance of the courts.¹⁵¹ To me these ideas seem intuitive. In *Falness*, the Arizona Supreme Court could have done what it did in *Broemmer*. There the court gave the plaintiff the insight of plaintiffs' lawyers, lawyers who know that insurance companies are likely to grant larger settlements when threatened with malpractice cases in front of juries than with arbitration in front of a doctor arbitration panel. Only when armed with that knowledge could Melinda Broemmer have logically rejected her contract because of the arbitration clause; thus the court treated her as an informed hypothetical consumer.¹⁵² To be consistent, should the court take *Averett* and *Falness* back to the time when they signed their contracts and assume that they understood the insurance companies' rationale and appreciated how much they would have had to pay for true first-party insurance? If that were so, and if one assumed those hypothetical circumstances (as the court seemed to do in *Broemmer*), one might conclude that the plaintiffs in both *Falness* and *Averett* would have signed their policies despite their "surprise."

Put another way, is the test of surprise whether an uninformed person, unaware of the rationale behind a clause, would have been surprised to find it, or whether a reasonably informed layman would have been surprised to find it? If, as in Arizona, one takes the plaintiff in his full ignorance, it is easy to find surprise; a more fair and sensible outcome, however, might be to assume the reaction of an informed hypothetical consumer.

III. BEYOND INSURANCE POLICIES

After *Darner* in 1984, the Arizona Court of Appeals heard eighteen cases in which section 211(3) was argued. Beginning with *Rocz v. Drexel Burnham*

151. This arrogance is but a specific example of the more general attitude of consumer advocates who seem always to regard their clients as less intelligent than they really are.

152. See *supra* notes 118-19 and accompanying text.

Lambert,¹⁵³ the court of appeals heard five cases (including *Broemmer*) in which parties attempted to escape standardized contracts other than insurance policies.¹⁵⁴

In *Rocz*, the plaintiff investor alleged that she had lost \$33,000 in seven months as a result of her broker's churning her account.¹⁵⁵ Drexel Burnham moved to compel arbitration under the parties' agreement,¹⁵⁶ and the plaintiff challenged the arbitration clause under section 211(3).¹⁵⁷ Noting that the arbitration clause was "clearly worded" and would have been easy to understand if read, the court rejected *Rocz*'s argument.¹⁵⁸ It noted the "strong legislative policy favoring arbitration."¹⁵⁹

The short shrift given to Ms. *Rocz* by the court of appeals might lead one to conclude that the courts of Arizona would limit section 211(3) to insurance cases. Her arguments about the lack of bargaining, the standardized terms, and the failure to read or understand¹⁶⁰ are the standard stuff of the other cases; nevertheless, the court of appeals reversed the trial court's judgment on behalf of the plaintiff, where she had been successful on the 211(3) argument.¹⁶¹

The second case, *Angus Medical Co. v. Digital Equipment Corp.*,¹⁶² is a giant step beyond insurance. The Arizona Court of Appeals applied section 211(3) to save a business from a term in a commercial business contract. *Angus Medical* had engaged with *Digital Equipment* to rewrite certain programs so that they would operate properly on the hardware owned by *Angus Medical*.¹⁶³ The agreement between the two contained an eighteen-month contractual statute of limitations and a merger clause stating that *Angus Medical* had read and agreed to the software terms and that no other "verbal" agreement would be binding.¹⁶⁴ *Angus Medical* claimed that a

153. 743 P.2d 971 (Ariz. Ct. App. 1987).

154. See *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 877 P.2d 1345 (Ariz. Ct. App. 1994); *Maxwell v. Fidelity Fin. Servs.*, 880 P.2d 1090 (Ariz. Ct. App. 1993); *Angus Med. Co. v. Digital Equip. Corp.*, 840 P.2d 1024 (Ariz. Ct. App. 1992); *Broemmer v. Otto*, 821 P.2d 204 (Ariz. Ct. App. 1991); *Rocz*, 743 P.2d 971.

155. *Rocz*, 743 P.2d at 973.

156. *Id.*

157. *Id.* at 975.

158. *Id.*

159. *Id.*

160. See *id.*

161. *Id.* at 976.

162. 840 P.2d 1024 (Ariz. Ct. App. 1992).

163. *Id.* at 1025-26.

164. *Id.* at 1026.

representative of Digital Equipment had assured them that the boilerplate terms were not binding.¹⁶⁵ Noting that *Gordinier*¹⁶⁶ applied section 211(3) to “unambiguous boilerplate terms,” and concluding that Angus Medical “had not had an opportunity to read the Terms and Conditions . . . before signing [the agreement],”¹⁶⁷ the court concluded that Angus Medical should get a trial, where it could show that the terms were unusual or unexpected and that Angus would not have agreed to the contract had it known of the terms.

How remarkable and how threatening. Section 211(3) was raised not by a consumer, not by an oppressed insured, but by a commercial party about a commercial contract. It was not raised over a child’s or a wife’s spilled blood, but over a buyer’s inability to recover money. Moreover, the plaintiff complained not about a draconian term, but about a contractual statute of limitations of the kind implicitly endorsed by UCC section 2-725(1), which states that a party must bring its suit within four years after its claim has accrued.¹⁶⁸

In the third and fourth cases, *Maxwell v. Fidelity Financial Services*¹⁶⁹ and *Phoenix Baptist Hospital & Medical Center v. Aiken*,¹⁷⁰ the court of appeals dealt respectively with a loan agreement and deed of trust¹⁷¹ and with a husband’s guarantee of payments for his wife’s hospital bill when she was taken to the emergency room.¹⁷² The *Maxwell* court rejected the section 211(3) argument¹⁷³ and affirmed the trial court’s summary judgment against the debtor who claimed that the loan agreement and deed of trust should be avoided.¹⁷⁴ The *Aiken* court, however, reversed the trial court’s summary judgment¹⁷⁵ and permitted the husband to raise section 211(3) against documents that he had signed in the hospital emergency room where he went with his wife who had had a heart attack.¹⁷⁶ He claimed that he did not have

165. *Id.*

166. *See supra* notes 83-94 and accompanying text.

167. *Angus Med.*, 840 P.2d at 1030-31.

168. U.C.C. § 2-725(1) (1995). The *Angus Medical* court nevertheless affirmed the trial court’s summary judgment *against* the plaintiff on its unconscionability count. *Angus Medical*, 840 P.2d at 1031-32.

169. 880 P.2d 1090 (Ariz. Ct. App. 1993).

170. 877 P.2d 1345 (Ariz. Ct. App. 1994).

171. *Maxwell*, 880 P.2d at 1092.

172. *Aiken*, 877 P.2d at 1347.

173. *Maxwell*, 880 P.2d at 1094-95.

174. *Id.* at 1092.

175. *Aiken*, 877 P.2d at 1347.

176. *Id.* at 1349.

his reading glasses and alleged that the documents had not been explained to him.¹⁷⁷ The court concluded that there was a material issue of fact as to whether the husband had a reasonable expectation that what he was signing in the emergency room under “stressful circumstances” would provide for the liability for his wife’s care to attach “to his separate property.”¹⁷⁸

Given the widespread knowledge about the economic difficulties of hospitals and recurring jokes about how money-hungry the hospitals have become, what else does one expect to sign in the emergency room? I would have thought it quite reasonable to expect that the emergency room—which often has had no prior contact with the patient—would expect an accompanying family member to promise to pay. Not according to Mr. Aiken.

Note that the unconscionability doctrine fits *Aiken* more comfortably than the “reasonable expectations” doctrine of section 211(3). Under section 211(3), a standardized agreement is not binding on the signer if the one presenting the document could reasonably believe that the signer would not have signed it had he known its provisions.¹⁷⁹ It is almost certain that Mr. Aiken would have signed this agreement even if he had known its provisions. By hypothesis, his wife was lying in a bay in the emergency room, receiving treatment after a heart attack. If the clerical person had explained to him that he was promising to pay for her treatment, would he have instructed the hospital to detach the IV and heart monitor so that he could take her out on the street? Clearly not, yet Mr. Aiken’s presumptive refusal to go forward with the agreement despite being informed was a condition of section 211(3)’s application.

Ironically, the greater the power of the one offering the standardized form, the less likely the signer can avoid it under section 211(3). On the other hand, the greater the power, the greater the stress, the more likely the clause is to be unconscionable. Thus, the *Aiken* court’s judgment that the agreement at issue might be unconscionable¹⁸⁰ is easier to support than the judgment that it violated section 211(3).

Aiken shows that it is a mistake to confuse section 211(3) with unconscionability. In most cases, unconscionability claims are harder to sustain than section 211(3) claims, but that is not always true. If Mr. Aiken’s

177. *Id.* at 1348.

178. *Id.* at 1349.

179. *See supra* note 9 and accompanying text.

180. *See Aiken*, 877 P.2d at 1349-50 (discussing unconscionability).

unconscionability claim ultimately fails against Phoenix Baptist Hospital, it will do so because the term itself (paying for a wife's treatment) was not substantively unconscionable. There was plenty of evidence of procedural unconscionability, taking advantage of one upset over the illness of a loved one and without the glasses necessary to read the agreement that he had signed.

IV. LESSONS FROM ARIZONA

What lessons can one draw from the Arizona cases? Is the proposal for Revised 2-206(a) so different from section 211(3) that the offspring of one are not comparable to the offspring of the other? If one can draw inferences from the Arizona cases, what are they? What do they tell us about the kinds of cases that will be brought under Revised 2-206(a) and about the judicial response to those cases?

Because Article 2 deals mostly with sales of goods and Article 2A mostly with leases of goods, one would expect Revised 2-206 and Revised 2A-206 to apply to contracts for cash sales, credit sales (including retail installment sales contracts), rental agreements for automobiles and other personal property, and leases of automobiles and other personal property. The principal object of a consumer's attack under Revised 2-206(a) in these contracts is likely to be the remedy limitations and analogous provisions, such as disclaimers of warranty, shortening of statute of limitations, and liquidated damages provisions.

But the consumer's attack will not be limited to those topics. For example, one can imagine a challenge to a term in a car rental contract that prohibits anyone but the signer from driving the car and that voids some of the rental company's responsibilities if there are other drivers. In addition to the challenges that are likely to come against the standard but complicated liquidated damages provisions in car lease contracts, one might imagine challenges to various provisions obliging the consumer to do certain unexpected repairs or even to buy and provide certain kinds of insurance. Because Revised 2-206(a) is aimed at *any* and every term that is not reasonably expected,¹⁸¹ it is impossible to know which clauses will be attacked and which will escape.

Although a major part of a typical retail installment sales contract is a

181. See *supra* note 4 and accompanying text.

security agreement that would normally be subject to Article 9 and not to Article 2, its terms are also part of the sales contract and are, therefore, arguably subject to Revised 2-206. Thus, one might also expect challenges to a creditor's right to accelerate payments and to other "creditors' rights."

From the language of Revised 2-206(a) and from the Arizona cases, I make six predictions about the influence of Revised 2-206:

A. Revised 2-206 Will Be Much More Influential Than Section 211(3) of the Restatement (Second) Has Been

Consider the substantive differences between Revised 2-206(a) and article 2.20 of the UNIDROIT Principles, on the one hand, and the *Restatement* section 211(3), on the other.¹⁸² As I point out above, the *Restatement* asks whether the person offering the form—the drafter—"has reason to believe" that the other party would not consent to it if he knew what it contained.¹⁸³ By contrast, Revised 2-206(a) and UNIDROIT Principles article 2.20 focus directly upon the expectations of the "other party"—the signer or offeree.¹⁸⁴

Second, the UNIDROIT Principles and Revised 2-206 require only that the signer "would not expect."¹⁸⁵ They do not have section 211's additional requirement that if the signer had known of the term, he would not have signed. Under Revised 2-206, a consumer could concede that even if he had known of the term, he still would have signed, yet be free of the term because it was not expected.¹⁸⁶ Under section 211(3) of the *Restatement*, such a concession (or at least such a concession on behalf of a hypothetical signer) would deprive that person of the protection of the section.¹⁸⁷

All of the differences between Revised 2-206 and section 211(3) of the *Restatement* suggest that the Revised 2-206 will be at least as favorable to the challenging signer as section 211(3) is. Because appellate courts in Arizona have not been rigorous in following the letter of section 211(3), the difference may be less than meets the eye. In most cases, the Arizona Supreme Court has interpreted section 211(3) as though it does not require a look at the

182. Compare text accompanying *supra* note 3 (Revised section 2-206(a)) and *supra* note 7 and accompanying text (UNIDROIT Principles of International Commercial Contracts art. 2.20) with *supra* note 9 and accompanying text (RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981)).

183. See *supra* note 10 and accompanying text.

184. See *supra* notes 3, 7 and accompanying text.

185. See *id.*

186. See *supra* text accompanying note 3.

187. See *supra* note 9 and accompanying text.

“drafter’s” intent, and the court has paid little heed to the requirement that a signer be freed of a term only if he would not have signed had he known of the term. The court has made mincemeat out of Mr. Willard’s requirement that a signer “take the good with the bad.”¹⁸⁸ Generally, the court has looked directly at the state of mind of the “party manifesting assent,” not at the belief of the drafter about what a hypothetical signer might think. Indeed, the Arizona courts often describe this approach as the doctrine of “reasonable expectations”—meaning the reasonable expectations of the signer, not of the drafter. The Arizona Supreme Court itself has paid only lip service to the notion that one must show that he, or a hypothetical signer, could not have been expected to sign a form containing the offending term.

In short, the substantive rules in Revised 2-206 are more generous to the challenging consumer than the rules in *Restatement* section 211(3). If anything, one should expect a greater number of challenges and a greater number of successes by consumer advocates under Revised 2-206(a) than they have enjoyed under *Restatement* section 211(3).

Notwithstanding the substantive power of Revised 2-206(a), one might conclude that section 2-206(a) will little influence the courts because decisions like those in Arizona depend upon the presence of a determined and powerful champion, such as Justice Feldman. That section 211(3) has had only sporadic influence on the courts outside of Arizona suggests that that claim is true. However, because Revised 2-206(a) will be a statute enacted by state legislatures, it will not need a champion such as Justice Feldman. Revised 2-206(a) will come as an order from one’s superiors—the local legislature—not as an exhortation from the people on the East Coast about how to behave.

As a legal realist, I believe that the inclusion of Revised 2-206(a) in the Uniform Commercial Code will make it much more powerful than section 211(3) of the *Restatement* but for reasons unrelated to a state legislature’s imprimatur. Because Article 2 is covered in every first-year contracts course, lawyers will quickly learn of Revised 2-206. Section 211(3) is by contrast an obscure section that is almost never reached in contracts courses. If one were to put section 211(3) in front of one thousand lawyers and ask their opinion, most of them would regard it as unknown to American law—perhaps copied from some civil code in Eastern Europe. Only a handful of the lawyers would recognize that section 211(3) has been a part of the *Restatement of Contracts*

188. See *supra* note 13 and accompanying text.

for more than fifteen years. Only a precious few would agree with Justice Feldman's hyperbole that section 211(3) is a standard principle of American contract law.¹⁸⁹

Passage of Revised 2-206 will change the situation. Nearly every contracts course in nearly every law school covers the contract formation and contract interpretation provisions of Article 2. Section 2-207, which first came into our law with the adoption of the UCC in the 1960s, is now known to nearly every lawyer. There is no reason to believe that Revised 2-206(a) will be any different.

B. Revised 2-206(a) Will Have a Much Greater Influence Than the Unconscionability Doctrine Has Had

The Arizona cases make clear that the doctrine of reasonable expectations is different from the doctrine of unconscionability and generally grants greater rights to consumers. Conventional interpretations of section 2-302 on unconscionability require a finding of both procedural and substantive unconscionability.

Procedural unconscionability requires something stronger than one usually sees in the Arizona cases, although one can imagine some of these cases (e.g., *Aiken*) fitting the procedural unconscionability rubric. Cases such as *Darner*, where the insurance agent allegedly gave bad information to a businessman,¹⁹⁰ or *Gordinier*, where the insurance policy had perfectly well-intentioned but arguably obscure language,¹⁹¹ do not meet the conventional test of procedural unconscionability. Thus, many of the contractual clauses in the Arizona cases would not be unconscionable because few arise out of procedurally unconscionable conduct.

Worse for the advocate of unconscionability, the contract terms in the Arizona cases are not substantively unconscionable. Recall that section 2-

189. See *supra* note 113 and accompanying text. Between October 18, 1996 and November 1, 1996, my research assistant Jennifer Gallagher, University of Michigan Law School, Class of 1996, interviewed 26 of the approximately 40 lawyers who had been involved in some way or another with the Arizona cases. Nineteen of those interviewed believed that *Darner* and the cases that have followed them have had a large impact on contract interpretation and enforcement in Arizona.

The interviews confirm Justice Feldman's assertions, at least as to Arizona law. The experience in Arizona also confirms my view that the critical question is whether the idea is in the lawyers' minds—irrespective of how it got there—because of a prominent judge's writing on the Arizona Supreme Court or because of its inclusion in a law school contracts course.

190. See *supra* notes 27-55 and accompanying text.

191. See *supra* notes 83-98 and accompanying text.

302(2) requires the court to afford the defendant “a reasonable opportunity to present evidence as to [the clause’s] commercial setting, purpose and effect”¹⁹² In every one of the insurance cases, the insurance company would be able to present plausible explanations for the terms in its contract. These explanations might not satisfy Justice Feldman, but they would satisfy most objective observers. Other clauses, such as the arbitration clause involved in *Broemmer*, could not be found to be substantively unconscionable even by the most zealous consumer advocate. Thus, the use of section 211(3) in the Arizona courts tells us that its reasonable expectations doctrine is something more than, and different from, unconscionability. The adoption of Revised 2-206(a) is not merely a restatement of the existing rules.

C. Revised Section 2-206(a) Will Foreclose Summary Judgment Against Consumers in Form Contract Cases

Most of the Arizona cases came to the Arizona Court of Appeals after the trial court had granted summary judgment against the signer of the defendant’s form contract.¹⁹³ All seven of the cases that came to the Arizona Supreme Court resulted in some form of judgment for, or settlement on behalf of, the plaintiff,¹⁹⁴ even though summary judgment had been originally granted in favor of the drafter of the form in four of those cases at the trial court.¹⁹⁵

The lawyers who handled the Arizona cases believe that summary judgment is now much less frequently granted than was true before 211(3) entered the consciousness of lawyers and judges in Arizona.¹⁹⁶ In the words

192. U.C.C. § 2-302(2) (1995).

193. See *Averett v. Farmers Ins. Co.*, 869 P.2d 505 (Ariz. 1994); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992); *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277 (Ariz. 1987); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984); *Phoenix Baptist Hosp. & Med. Ctr. v. Aiken*, 877 P.2d 1345 (Ariz. Ct. App. 1994); *Maxwell v. Fidelity Fin. Servs.*, 880 P.2d 1090 (Ariz. Ct. App. 1993); *Angus Med. Co. v. Digital Equip. Corp.*, 840 P.2d 1024 (Ariz. Ct. App. 1992).

194. See *supra* Part II.

195. All of the cases that were remanded settled without trial.

196. Most of the 26 lawyers, see *supra* note 189, had no opinion whether *Darner* and the cases that followed had decreased the probability of summary judgment, yet all but one of those who had an opinion believed that those cases had made it more difficult to obtain summary judgment. Not surprisingly, this view was more widely held by the defendants’ lawyers than by the plaintiffs’ lawyers. At least one lawyer believed that summary judgment has become less likely; another believed that summary judgments were easier to obtain because during the past decade, the courts have adopted a directed verdict standard rather than any “scintilla of evidence” standard.

of several Arizona lawyers, every insured now claims reasonably to expect “full coverage” from every insurance contract.

Because Revised 2-206(a) requires a finding on the “expectations” of a “reasonable consumer,”¹⁹⁷ nearly every case will include a material factual issue, namely the state of a hypothetical consumer’s expectations in *that* situation. If the courts hew carefully to the expectations of a hypothetical consumer instead of *the* actual consumer, summary judgment will be more likely, but any lawyer worth his salt will argue that there is a question of fact whether a reasonably prudent consumer faced with the particular issues before the court could have reasonably expected the clauses contained in the form contract. Under either characterization of the “expectation” rule, many cases that now would be resolved against the consumer through summary judgment will under Revised 2-206(a) have to be tried.

If the outcomes after trial are no different from those that would have resulted from summary judgment, this law adds a deadweight loss to the judicial system. That loss may be borne by the drafter in the form of a settlement to avoid trial or by both the consumer and the drafter in the form of lawyers’ fees and other trial costs. Obtaining a different result at trial clearly benefits plaintiffs, but it is unclear whether it will benefit consumers as a whole and society at large. If greater success for plaintiffs results only because the jury is sympathetic to those who have improvidently signed a form contract, greater loss will have to be borne by all of the consumer and merchant classes. It is hard to know whether a judge’s decision on summary judgment is more reliable than judgment by a jury or by a judge after trial, but it is clear that a regime where summary judgment is impossible inspires more litigation and is more expensive than one where the converse is true.

D. Fourth, Revised 2-206(a) Will Grant Trial and Appellate Judges Grand Discretion to Uphold or Overturn Form Contracts

The most significant learning from the Arizona cases is that Revised 2-206(a) will grant large discretion to judges.¹⁹⁸ This wide range of discretion

197. See *supra* text accompanying note 3.

198. Because most of the cases have come to the appellate courts from summary judgments against the signer in the trial courts, see *supra* note 193 and accompanying text, there is little testimony about the actual expectation of the signer in the records. Some of the opinions make reference to the statements of the insured, sometimes put before the court in an affidavit in opposition to a motion for summary judgment. At times there is testimony about the oral interchange between the drafter and the signer, see, e.g., *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 390-91

on the part of both trial and appellate judges is demonstrated by the fact that five of the six cases appealed to the Arizona Supreme Court were decided differently by the court of appeals judges than by the justices of the Arizona Supreme Court.¹⁹⁹ Of the ninety-nine judges who passed on the twenty-five cases at the trial, intermediate appellate, and supreme courts in Arizona, fifty-nine decided to uphold the form contract, and forty decided to overturn it. Most of the cases in the sample, including those that never reached the Arizona Supreme Court, resulted in summary judgments on behalf of the defendant drafters by trial judges.²⁰⁰ Neither the trial judges nor the judges on the court of appeals are heartless monsters. Giving them the benefit of the doubt, one should conclude that they truly believed that drafters would not have reasonably expected the parties who signed the standardized forms to refuse them. Many of the trial judges must have had an opportunity to observe the plaintiffs and must, therefore, have had more verbal and nonverbal data on which to base a judgment about the plaintiffs' expectations.

These judges are not coming to a reasoned but erroneous conclusion based on a complex set of legal principles. They are making a gestalt judgment about a party's expectations. Notwithstanding that fact and despite the absence of any tangible standards, the Arizona Supreme Court has routinely reversed the lower court judges.²⁰¹

(Ariz. 1984) (discussing testimony from Darner, the insurance agent, and a third person), but such testimony is the exception. Where there is no affidavit or oral testimony, the reasonable expectation that is fulfilled by the court is in truth the expectation of the appellate judge. The question is not, would the insurance company have expected the insured to object, or under Revised 2-206(a), would the signing party have expected, but would *I*, the appellate or trial judge, have expected this term? This situation, of course, accounts for the high variability of the conclusions in the appellate courts, where 34 judges decided one way and 17 the other. It will also be the source of the great discretion granted to the courts by Revised 2-206(a).

199. See *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992); *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277 (Ariz. 1987); *State Farm Mut. Auto. Ins. Co. v. Bogart*, 717 P.2d 449 (Ariz. 1986); *Gilbreath v. St. Paul Fire & Marine Ins. Co.*, 685 P.2d 729 (Ariz. 1984); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388 (Ariz. 1984).

200. See *supra* note 193 and accompanying text.

201. The arguments against judicial activism like that practiced by Justice Feldman are well known. The judge has no way of knowing the wider impact of his decision and no way to set down rules except by reference to the cases that come before him. In doing good for a particular consumer, he may do bad for society at large, but as a judge not confronted by the kind of evidence that might be brought to a legislature, he is free to live in the uninformed belief that he has done good, even when that is not true.

The drafters of uniform laws are only slightly better off than judicial activists. They have no staff, rarely receive reliable empirical data about the probable impact of particular versions before them, and must grope along in almost the same ignorance that attends a judge's decisions. On the other hand, Commissioners are not limited to the particular cases that come before them, are free to adopt or

E. The Courts Will Disagree on the Question Whether the Expectations of the Particular Plaintiff Consumer—or Those of Some Hypothetical Consumer—Are to Be Considered

The cases in Arizona and the experience in drafting Revised 2-206(a) foretell confusion on the question of whether the “expectations” will be those of the particular signer in front of the court or of a generic or tailored hypothetical consumer. After the July 1996 annual meeting of NCCUSL, Reporter, Professor Richard Speidel, indicated that he would make clear that the test to apply should be that of a reasonable prudent signer, not of the particular signer before the court.²⁰² Apparently, he deleted the last sentence of Revised 2-206(b) to accomplish that end. That sentence would have told “the court . . . [to] consider the content, language, and presentation of the standard form or standard term.”²⁰³ Thus, the last sentence would have been construed by some courts as an instruction to look at the particular circumstances of the individual consumer before the court.²⁰⁴ Even after this deletion, however, a court is not instructed to adopt a completely hypothetical consumer’s expectations.

In the proposed draft of March 21, 1997, section 2-206(b) described the evidence that a court was to consider in determining which terms should be included or excluded.²⁰⁵ In some cases these would have directed the court’s attention to the particular understanding of the consumer before the court and not to the understanding of a hypothetical consumer. On the weekend of March 22, 1997, the Drafting Committee removed all of subsection (b) except the first sentence. The Committee then added the clause at the end of 2-206(a): “unless the consumer had knowledge of the term before the contract was authenticated.”²⁰⁶ This clause, of course, directs the court to the particular knowledge of the actual consumer before it—as contrasted with the rest of the sentence that directs one to the expectations of a “reasonable consumer in a

discard general rules that will apply to many cases, and can decline to deal with an issue if they so choose.

202. See Speidel Memorandum of Aug. 1996, *supra* note 14, at 6.

203. Aug. 1996 Draft, Art. 2, *supra* note 2, § 2-206.

204. Some courts may interpret that language to be an instruction not to look at the particular signer but to look at the way in which some subclass of hypothetical signers might respond to the particular circumstances of the clause.

205. Draft, Uniform Commercial Code Revised Article 2 Sales § 2-206(6) (Nat’l Conference of Comm’rs on Unif. State Laws, Mar. 21, 1997) [hereinafter Mar. 1997 Draft, Art. 2], available at <<http://www.law.upenn.edu/library/ulc/ulc.htm>> (visited on Apr. 8, 1997).

206. See text accompanying *supra* note 3.

transaction of this type.” I cannot quarrel with the clarity of the statutory standard (i.e., the consumer loses (1) if a hypothetical consumer in his shoes would have *expected the term* or (2) if “*this particular consumer*” had knowledge of it). Despite the careful choice of a hypothetical consumer in the dependent clause, I am not sanguine about the willingness and ability of courts to keep the two separate. My skepticism is supported by the behavior of the Arizona courts.

For the most part, the Arizona courts have dealt specifically and explicitly with the particular party before the court. In one case, the Arizona Supreme Court armed a party with particular knowledge,²⁰⁷ but by and large the court took the signers as it found them and focused on the subjective qualities of those particular signers in their particular circumstances. Recall *Broemmer*, in which the court noted that the person signing the arbitration clause was a twenty-one-year-old woman who had only a high school education.²⁰⁸ Or consider the case of Mr. Aiken, whose expectations were violated because he had come to the emergency room emotionally upset and did not have his reading glasses.²⁰⁹

The Arizona courts have focused on *the* signer despite the fact that section 211(3) instructs the court to put itself in the mind of the drafter of the form and, necessarily, to think about hypothetical signers.²¹⁰

I predict that the current articulation will cause courts to do what the courts have done in Arizona: to focus more on the particular status of the particular consumer than on a hypothetical consumer. Because the Arizona courts have taken that approach in the face of a rule which more clearly points to a hypothetical or objective signer than does Revised 2-206(a), I predict that a court will be at least as likely to look at the particular person in front of it under Revised 2-206 than the Arizona courts have under section 211(3).

207. See *supra* notes 117-19 and accompanying text.

208. *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1014 (Ariz. 1992). Perhaps to the *Broemmer* court she seemed particularly ignorant because, like me, she was from Iowa.

209. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 877 P.2d 1345, 1348 (Ariz. Ct. App. 1994).

210. See *supra* note 9 and accompanying text. While it is not fair to expect the drafter to imagine every conceivable signer, it is fair to ask the signer to consider classes of persons that might sign the document and to put herself in the mind of those persons to determine whether they would be surprised by a term. At a minimum, courts should put themselves in the shoes of the drafter and ask whether that drafter would have “reason to believe” that the average hypothetical person expected to sign the document would be surprised by its terms.

F. Revised 2-206(a) Will Be Resistant to the Traditional Cures of Corporate Lawyers'

Because both section 211(3) and Revised 2-206(a) invalidate any offensive term, they are like a virus that attacks a corporate lawyer's immune system. A corporate lawyer's traditional response to trouble is to draft a contract term to deal with the threat. When the term itself is attacked, he has few defenses.

One defense offered by Revised 2-206(a) is to cause the consumer to acquire "knowledge" of the term.²¹¹ A consumer who knowingly initials one or several parts of a contract—a 1á Hertz and the hotels—may be considered to have "knowledge" of those terms. One response to Revised 2-206(a) is for drafters to make important provisions more prominent and to require the consumer's initials next to those provisions. Of course, that method has its limitations. By hypothesis if the consumer is made to initial every term in the contract, no term has been made more prominent, and there may be no "knowledge" of any of the terms. Even if the offeror of the form has the consumer initial some or a few of the clauses, that puts other clauses at risk. Highlighting some clauses necessarily diminishes the apparent significance of others and thus diminishes the chance that they will have entered the consciousness of the consumer. I see palliatives for the corporate drafter but no contractual solutions.

Particularly threatening for the drafter is the fact that Revised 2-206(a) is not aimed at a particular term.²¹² Unlike current consumer protection provisions like sections 2-316 and 2-719, it is aimed at all the terms. If, for example, the drafter believes that his disclaimer or limitation of remedies is the most important provision, he can surely make that prominent and have it signed. However, he leaves himself open to attack based on Revised 2-206(a) for some other contractual term that the consumer maintains he could not have been expected by a "reasonable consumer." Because Revised 2-206(a) is aimed at no particular term, but at all, it is more threatening to the drafter than specific provisions aimed at a single issue with their own formalistic safe harbors.²¹³

211. See *supra* text accompanying note 3.

212. See U.C.C. § 2-316 (1995).

213. E.g., *id.* (exclusion or modification of warranties).

V. CONCLUSION

If I am right that Revised 2-206(a)—like section 211(3) in Arizona—will not merely cause greater disclosure to the signer, it will outlaw certain clauses in form contracts. The true effect of the provision will be to set a minimal though variable level of liability for sellers and lessors. Unlike the Truth in Lending Act where a lender who makes a form disclosure is protected whether or not the form disclosure is read and understood,²¹⁴ Revised 2-206(a) cannot be satisfied by a form disclosure; it offers no safe harbor. If one assumes that consumers cannot be made to read form contracts, then Revised 2-206(a) cannot be cured by disclosure. It excises the term that the court concludes could not have been reasonably expected. In doing so, it sets a minimal though unpredictable level of liability.

By requiring that certain liability be borne by sellers and lessors and by effectively foreclosing their ability to cast that liability onto the backs of buyers, lessees, and the like, a state legislature runs the risk of creating inefficiency. Some buyers and lessees may wish to assume certain risks; some consumers may find it cheaper to bear certain risks than to pay lessors and sellers to undertake them. Where the lessee or buyer is the one who can least expensively avoid the loss, it is inefficient to force the seller or lessor to bear that risk. Yet if no form contract between these parties is enforced, the parties may have no inexpensive way of making an agreement that shifts the loss from the merchant to the consumer.

It will be as though the sugar lobby persuaded the legislature to pass a law that prohibited grocery stores from selling any cereal except sugared cereal packaged in a box. By forcing cereal buyers who wish to use artificial sweeteners or who already have a supply of sugar to buy sugar with their cereal, the legislature will cause an obvious inefficiency. By adopting Revised 2-206(a) and so voiding certain form clauses that may represent an intelligent division of the risks and benefits between merchants and consumers, the legislature runs the same risk.

Revised 2-206(a) also carries a more certain cost: an increase in the cost of judicial determination. Revised 2-206(a) will make summary judgment in form contract cases less frequent; it will therefore add cost in the form of lawyers' fees, witnesses' fees, and court time for resolution of the disputes. It may also cause cases to be filed that would never have been filed under a

214. See 15 U.S.C. § 105 (1994).

more strict regime. A lawyer with a frivolous but appealing claim may decline to file suit where a judge has the power to grant summary judgment against him, but he may choose to file the same suit where he can “get to the jury.” Thus, the advocates of Revised 2-206(a) must show not only that Revised 2-206(a) is more efficient than current law, but also that the value it gives to consumers exceeds the costs to merchants by more than the additional costs of lawyers’ fees and the like. I doubt that can be demonstrated.

Believing that consumers are smarter, more cunning, and far less honest than their advocates make them out to be, I fear that Revised 2-206(a) will give many sympathetic and well-coached consumers deals for which they did not pay. I also fear that Revised 2-206(a) will stimulate new litigation. Because the provision attacks the very mechanism by which parties allocate loss (form contracts), it is unclear how these costs of litigation and of unbargained deals—which will be put on the backs of the honest majority of the consumer class—can be moved elsewhere. In sum, I do not believe that a case has been made for Revised 2-206(a).